3 White & Tudor Lead. Cas. Eq. 430. Nor is the trustee's liability increased by his dealing with his co-trustee as an agent. A trustee has power to appoint an agent to do certain ministerial acts, as, for example, to purchase specified stock; and one of the trustees may be appointed such an agent. *Purdy* v. *Lynch*, 145 N. Y. 462; see PERRY, TRUSTS § 404. In appointing and dealing with agents, a trustee need exercise only the same amount of care as a reasonable man of business would exercise in regard to similar affairs of his own. *Speight* v. *Gaunt*, 9 App. Cas. 1. The trustee here did exercise such reasonable care in dealing with his co-trustee as agent, and so is clearly not liable.

WITNESSES — PRIVILEGED COMMUNICATIONS — REPORT OF RAILWAY ACCIDENT. — The defendant company required from its servants a report of the particulars of every accident, partly with a view to possible litigation. *Held*, that documents containing such reports are not privileged. *Savage* v. *Canadian Pacific Ry. Co.*, 41 Can. L. J. 670 (Manitoba, K. B., June 15, 1905).

The doctrine of privileged communication between attorney and client is one of expediency, since the former must have as full information as possible in order to protect the interests of the latter. But this doctrine appears to have been extended very far in some cases of communications from or to third persons, which, clearly, should not be privileged unless such privilege is necessary for the protection of the relation between attorney and client. *Glyn* v. *Caulfeild*, 3 Mac. & G. 463. The mere fact that a party has, in view of litigation, obtained a report from a distant agent should not operate to give such party a privilege which one who has made a personal investigation under similar circumstances would not have. *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644. Such a report should on principle be privileged only when requested by the party's attorney, or for direct submission to him, with litigation definitely in view. *English* v. *Tottie*, 1 Q. B. D. 141. The privilege rightly discountenanced in the principal case would exempt practically all reports and accounts, being kept partly with a view to future possible litigation. It seems that as a rule no document made in the ordinary routine of business should be privileged. *Woolley* v. *North London Railway Co.*, L. R. 4 C. P. 602.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE PERSONALITY OF THE CORPORATION. — To decide cases on the authority of decisions that have gone before and the good, sound sense of the situation, without an over-nice inquiry into the fundamental theories of particular legal concepts is, perhaps, characteristic of Anglo-Saxon practical mindedness. Decisions are piled on decisions, phrases embodying slothful reasoning become threadbare by repetition, before the field is canvassed for a rational basis of the authorities or for a recognition of diverse conceptions expressed in conflicting authorities. That a definitely conceived theory may involve conclusions radically different from those obtained by a blind groping for results is probably nowhere more vitally true than in the law of corporations. The multiplication of questions presented and the extent to which corporations enter into the present social organization compel, for an intelligent dealing with the problems involved, too long neglected inquiries into the corporate idea.

Several theories of corporateness have been propounded, which will be found set forth in the highly suggestive Yorke Prize Essay of Mr. C. T. Carr, just issued by the Cambridge University Press. The investigation into the nature of the corporation is also pursued with great clearness and much vigor in the

last number of the Law Quarterly Review. *The Personality of the Corporation and the State*, by W. Jethro Brown, 21 L. Quar. Rev. 365 (Oct., 1905). After dwelling on the unsatisfactory state of legal learning on the subject, Mr. Brown recalls familiar principles of corporation law. A corporation is not identical with the individuals who compose it, nor is it the equivalent of the sum of its members. It is, therefore, a distinct subject of legal rights and duties; it is in law a person. "Wherever the law attributes rights or duties to an entity or institution, it makes a person of, or recognizes a person in, that entity or institution." Is the personification of the corporate entity an artificial, convenient fiction or is it suggested by, and does it result from, real analogies to natural personality? The fiction theory encounters this dilemma: either there are legal rights without a holder, or the rights are those of the incorporators. The first position is untenable. The alternative view finds its refutation in a consideration of human associations in general and corporations in particular. That a group is inherently different from the sum of the individuals composing it is a psychical fact. Historical considerations no less than a comparison with other so-called fictitious legal personifications, as *e. g.* the *hæreditas jacens* (see HOLMES, COMMON LAW 342 *et seq.*), refute the contention that the corporation is a mere metaphor, a fiction. Bodies possessing all the essential attributes of corporateness existed before the alleged creation of corporations by charter or statute.[1] Corporations instead of being the creatures of the law compelled recognition from the law. In truth "the fiction theory is but a stage in the evolution of legal ideas." The phenomenon of corporate personality does not fit into known legal categories, but since it satisfies the test of personality in having capacity for legal rights and duties, it is most natural to treat it as though it were a person, with a slowly growing recognition that the analogy is more real than fictitious. But in attributing reality to this person, a real person must not be confused with an actual person. "When we say that this corporate person is not a legal fiction, we imply no more than that it is a representation of psychical realities which the law recognizes rather than creates." Among the numerous differences between corporations and physical persons special attention may be called to those relating to their origin and the faculties of willing and acting. Corporations are more the result of "conscious foresight" than physical persons; there is more of creation than of growth. The corporation wills by a majority, and acts, unlike an individual, through the mediation of another person best characterized, perhaps, as an organ. It is, then, neither an actual nor a fictitious person; it is a "psychical reality — a reality arising from unity of spirit, purpose, interests and organization." And after discarding various adjectives, "artificial," "juristic," "moral," "ideal," the author fastens on the name *collective person*. The relation of the corporation to other persons, legal and non-legal, is then treated and schematized.

That the author's purpose did not permit him an inquiry into various forms of unincorporated associations, especially trade-unions, in the light of the Taff Vale decision, is regrettable. The final discussion as to the theory of the state is, perhaps, of less immediate interest to the American reader. Mr. Brown thinks it is only a matter of time before the state as a collective real person will be recognized, with important differences as to control, growth, and development between the state and other collective persons.

While the object of this notice has been to call emphatic attention to this article, leaving to others a searching analysis, yet one or two comments suggest themselves. An adoption of this realistic theory seems to be tacitly made in the American doctrine of *de facto* corporations. Its frank avowal would give an intelligent basis for decisions that are too often supported by that most overworked of all legal arguments, estoppel. Further, its recognition would have an important bearing on the law of *ultra vires*. By asserting a personality apart from legal creation, a general capacity to contract must be conceded,

[1] To maintain that corporations are fictitious is, therefore, as Mr. Carr points out, adherence to the fiction theory purchased at the cost of another fiction. See Carr, Law of Corporations 174.

leaving the courts to deal with the abuse of corporate power as they do with that of the individual's contractual rights, on grounds of public policy and not corporate incapacity. See *The Unauthorized or Prohibited Exercise of Corporate Power*, by George Wharton Pepper, 9 HARV. L. REV. 255. Similar grounds of policy would explain the refusal of American courts to enforce corporate liability where an association actually formed has not substantially complied with the requirements of the law.

THE JURY SYSTEM IN THE UNITED STATES AND ITS EXTENSION TO THE PHILIPPINES. — Probably no recent address on a legal subject has provoked such widespread discussion as that delivered last June at the Commencement exercises of the Yale Law School. *The Administration of Criminal Law*, by William H. Taft, 15 Yale L. J. 1 (Nov., 1905). Secretary Taft points out that while the civil law has been content to leave much to the consciences of rulers, the common law protects the individual by insisting not so much on general principles as on forms of procedure. The most important of these is the right of trial by jury. Yet, though our Constitution requires issues of fact in civil cases at law involving more than twenty dollars to be tried before a jury, much the same issues in cases in equity are tried without one. Since the abolition by many of our codes of procedure of the distinction between law and equity in civil actions, a lawyer is needed to tell whether a suit brought is at law or in equity. Further, in more than half the civil suits a jury is dispensed with by consent of the parties. Certainly, under these conditions, the constitutional requirement of a jury trial cannot be said to rest on any fundamental principles; nor would the abolition of the requirement, with proper appeal, deprive a litigant of an impartial hearing. Consequently, as Secretary Taft questions the value of the system even in the United States, he is opposed to introducing it into the Philippines in civil suits. To introduce it in criminal cases would, similarly, be unwise. Criminal procedure in this country presents a lamentable contrast to that in England, where by the judges' retention of control over the jury, the lack of appeal, and the better quality of men available for jury service, a reputation for certainty of punishment is maintained. Here much legislation prevents the judge from being more than a moderator at a religious meeting. He is prohibited from commenting on the facts, which is essential if instructions are to be of value, and no opportunity is given him to dispel the sentimental atmosphere too often created by the attorney for the accused. The number of peremptory challenges allowed the defendant operates against securing as jurors men of force or of character. The ease of appeal on the slightest technicality, which stands between the defendant and his just conviction, is another cause of the laxness of administration of our criminal laws. When these are the conditions surrounding trial by jury in the United States, to extend it to the Philippines, where conditions are less favorable, would be impolitic. The Filipinos are still an ignorant people, and the juror in deciding between the state and the accused would be moved by every motive other than that of the well-being of the state. Moreover, the civil law, in force in the islands, lacks a code of evidence, almost an essential of the jury system.

While Secretary Taft's long experience and soundness of judgment entitle his opinion to great weight, his criticisms of the jury system have brought forth many protests, based on widely divergent grounds. One writer insists that the judge's functions are properly limited to those of moderator, and that therefore our restrictions have been wise. *Observations on Secretary Taft's Text*, by John J. Crandall, 28 N. J. L. J. 267. The prevailing opinion seems to be that while the shortcomings of our criminal procedure are undoubted, and to introduce the jury into the Philippines would be unwise, the Secretary of War has been too warm in his denunciation of the American jury trial. The limitations upon the power of the judge; the technicalities taken advantage of on appeal; the number of peremptory challenges and the many exemptions allowed,